

THE UNIVERSITY OF WISCONSIN
LAW SCHOOL

MADISON, WISCONSIN 53706

September 8, 1969

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Frank J. Remington

SUBJECT: Summary of action taken at the September 4-5, 1969
meeting

It occurs to me that it may be desirable in this memorandum to summarize the action taken at our recent meeting. Redrafts of the rules and Advisory Committee Notes are being prepared. Both the text and the notes will be submitted to the editorial committee which consists of Judges Zirpoli and Gesell, Bob Meserve, and myself. I assume that the final drafts approved by the editorial committee will then be forwarded to each member of the Advisory Committee.

It was agreed that there would be an explanation of the Advisory Committee's action accompanying the printed drafts which are to be circulated to the bench and bar. The explanation will indicate that the drafts as circulated represent the view of the majority of the members of the Advisory Committee but do not necessarily reflect, as to any specific rule, the view of any particular member of the committee. This decision followed an expression of concern on the part of Mr. Will Wilson that the circulation of the proposals, without explanation, might result in the Department of Justice's position being misunderstood. I note in reviewing the previous drafts of rules circulated to the bench and bar that there was a preliminary memorandum signed by Albert Maris as chairman of the rules committee, and signed also by the secretary of the rules committee. It seems to me that this might be the appropriate way to explain the fact that the proposals do not necessarily reflect the attitude of any individual member. I am sending copies of this memorandum to Judge Maris and to Bill Foley with the hope that they will let me know whether they agree that this is the desirable way to proceed. It would also be helpful to know whether Mr. Will Wilson thinks this an adequate way to present the position of the Department of Justice. My notes indicate that Mr. Wilson would like to work with the reporter on the development of an appropriate statement to be contained in the printed document.

The action on the specific rules was as follows:

Rule 1--Scope. Approved as submitted.

Rule 3--The Complaint. Approved as submitted.

Rule 4--Warrant or Summons Upon Complaint. The following changes were made:

(A) The word "Arrest" is added preceding the word "Warrant" in the title of the rule to make clear that the rule deals with the arrest warrant.

(B) There was an editorial change in the definition of the circumstances under which hearsay may be an adequate basis for a finding of probable cause. It reads: "The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished."

As amended, the rule was approved for circulation, with dissenting votes cast by the Department of Justice objecting to the codification of the circumstances under which probable cause may be based upon hearsay, and by Judge Johnson who objects to incorporating substantive definitions in the procedural rules.

Rule 5--Proceedings Before the Magistrate. Approved as submitted with a change in the title which will now read "Initial Appearance Before the Magistrate." Subdivision (a) will now read "In General." A dissenting vote was cast by the Department of Justice on the ground that subdivision (d)(1) incorporated the codification of the probable cause based on hearsay rule.

Rule 5.1--Preliminary Examination. Approved as submitted with the exception of an editorial change in the codification of the probable cause based on hearsay rule and the striking of the word "duplicate" from subdivision (c)(3). Dissenting votes were cast by the Department of Justice and Judge Johnson because the rule incorporates the codification of the probable cause based on hearsay rule.

Rule 12--Pleadings and Motions Before Trial; Defenses and Objections. Approved as circulated, with the following two changes:

(A) Subdivision (c) Motion Date is changed to add at the beginning of the subdivision the following language: "Unless otherwise provided by local rule, the court may,"

(B) Subdivision (d)(2) is amended to substitute "to afford an opportunity" for the language "to fulfill his responsibility."

The change in subdivision (c) is designed to make clear that some courts have local rules which fix the time of making motions. These may require motions to be made prior to the arraignment, and it is the judgment of the committee that such local rules ought to prevail when inconsistent with the general rule.

Rules 16, 16.1, 16.2, and 16.3 dealing with discovery.
The rules relating to discovery were approved as submitted, with the following changes:

(A) The four rules are to be recombined into a single rule 16 as is done in the present rule. The reason for this is to emphasize the committee's view that the proposed rule relating to discovery is to be viewed together as a single proposal with the recommendations about prosecution discovery integral to the proposals relating to expanded discovery by the defense. Some members of the committee (Joe Ball, for example) would rather have the committee support a rule on defense discovery quite apart from the decision about prosecution discovery, but the majority of the committee felt otherwise.

(B) In rule 16 as submitted, a new subdivision is added:

"(c) Grand Jury Transcripts. Except as provided in rule 6 and subdivision (a)(1) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury."

(C) The title of subdivision (a)(1) of rule 16.1 is changed to read "Documents and Tangible Objects."

(D) The committee decided to submit to the bench and bar an alternative draft of prosecution discovery which would make the right of discovery by the prosecution conditional upon a prior request for discovery by the defense. The approved provisions are as follows:

"Rule 16.1 Disclosure of Evidence by the Defendant.

"(a) Information Subject to Disclosure.

"(1) Documents and Tangible Objects. If the Court grants relief sought by the defendant under rule 16 (a) (4), the Court shall, upon motion of the government, order the defendant to permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

"(2) If the Court grants relief sought by the defendant under rule 16 (a)(5), the Court shall, upon motion of the government, order the defendant to permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant and which the defendant intends to introduce in evidence at the trial or which was prepared by a witness which the defendant intends to call at the trial and the results or reports relate to his testimony.

"(3) If the Court grants relief sought by the defendant under rule 16 (a)(6), the Court shall, upon motion of the government, order the defendant to furnish the government a list of the names and addresses of the witnesses he intends to call at the trial."

The decision to submit the alternative draft of prosecution discovery was unanimous. The Department of Justice dissented from the liberalization of the right of discovery by the defense.

Rule 20--Transfer from the District for Plea and Sentence.
Approved as submitted.

Rule 32.2--Presentence Investigation. Approved as submitted with the exception that subdivision (c)(3) is changed to substitute the word "shall" for the word "may." This brings the proposal into conformity with the present rule. There were four dissenting votes from Judges Johnson and Gesell, Mr. Wilson, and Mr. Blue.

Rule 40--Commitment to Another District; Removal. Approved as submitted.

Rule 41--Search and Seizure. Approved as submitted with the exception of an editorial change in the codification of the probable cause based upon hearsay rule. Dissenting votes were cast by the Department of Justice and Judge Johnson on the same grounds that were applicable to rule 4. Subdivision (c) is changed to make clear that the warrant may be based upon more than one affidavit.

Rule 46--Release from Custody Pending Further Judicial Proceedings. Approved as submitted, with the substitution of a revised subdivision (b) which reads as follows:

"(b) Release During Trial. A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial."

Rule 54--Application and Exception. Approved as submitted, with the following exceptions:

(A) Subdivision (a)(2) is eliminated. My recollection of the reason is that the application of the Magistrates Rules is a subject better dealt with in those rules themselves.

(B) Subdivision (a) is entitled "Courts" and the division reads as follows:

"These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam, in the District Court of the Virgin Islands, and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; . . ."

(C) The definition of "magistrate" is changed to read as follows:

"'Magistrate' includes a United States magistrate as defined in 28 U.S.C. §§631-639, a United States commissioner, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. §3041 to perform the functions prescribed in rules 3, 4, and 5."

Rule 6--The Grand Jury. Approved as submitted. The committee further decided to formally call the attention of the Judicial Conference to the fact that the problem of reporting grand jury proceedings needs further discussion. It was also suggested that the Advisory Committee Note indicate that the committee did not give further consideration to subdivision (e) in order to prevent misunderstanding about the relationship between the work of the committee and the Hughes case interpreting rule 16 to include discovery of grand jury transcripts.

Rules 8 and 14 deal with joinder and severance. The committee discussed the rules and continued them on the committee's agenda.

Rule 9--Warrant or Summons upon Indictment or Information. Approved as submitted, with the exception that subdivision (a)(1) is amended to strike the words "oath and by."

Rule 11--Pleas. There was an extensive discussion of rule 11 following which the committee decided to meet again on January 5-6, 1970, for the purpose of giving further consideration to rules 11, 45, and 48 which hopefully can contribute to the more prompt disposition of criminal cases. The decision to give early consideration to rule 11 was over the dissenting votes of Bob Meserve and Judge Johnson.

Chairman Zirpoli requested Maynard Pirsig to submit in writing the proposal which he stated orally to the committee. Chairman Zirpoli also requested Mr. Wilson to submit a proposal reflecting the views of the Department of Justice. It was agreed that suggested redrafts of rule 11 would be submitted to me on or before November 15, 1969, in order to afford me an opportunity to prepare the necessary drafts for committee consideration in advance of the January meeting.

Judge Edwards indicated his view that three basic suggestions should be incorporated. These include, first, that the draft say specifically that the judge not be directly involved in bargaining for plea of guilty; secondly, that the draft find a substitute for the phrase "plea bargaining" such as "conditional plea"; and, finally, that the draft provide that the "conditional plea" come before the court at only one time when all three parties, i.e., prosecution, defense, and probation department, are in agreement so that the trial judge's job is limited to either accepting or rejecting the negotiated plea.

Rule 29.1--Closing Argument in Jury Cases. The following draft was approved for circulation:

"After the closing of evidence the prosecution shall be permitted to open the argument to the jury. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal. Unless good cause is shown, the prosecution shall present in rebuttal no theory of law or fact which was not presented in one or both of the prior arguments."

Rule 41.1--Surveillance Warrant. The draft was rejected and no further submission is contemplated.

Rule 44--Right to and Assignment of Counsel. Approved as submitted.

Rule 45--Time. This was not extensively discussed. The general problem of means of improving the effectiveness of the administration of criminal justice was discussed, and it was decided to make this general issue the subject for the January meeting of the committee. There is an obvious difference of opinion within the committee as to the desirability of time limitations. One possibility, which I will pursue in draft form, is to mandate each district to develop local rules which will govern the timing of criminal cases. There may be other useful approaches. Any suggestions which members of the committee would like to see reflected in draft form would be much appreciated.

Rule 48--Dismissal. Approved as submitted, with the exception that subdivision (b)(3) is to read as follows:

"(3) If the court over objection of the prosecution dismisses an indictment, information or complaint under this subdivision, it shall state, on the record, its findings of fact and reasons for the dismissal."

It was assumed by the committee that the government does have the right to appeal and, where the dismissal occurs, the government can also reinstitute the prosecution. These points will be made clear in the Advisory Committee Note. The Department of Justice cast a dissenting vote.

Rule 17--Subpoena. Approved as submitted.